IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs May 14, 2008

# MARGIE J. FARLEY v. STATE OF TENNESSEE

**Direct Appeal from the Circuit Court for Warren County**
**No. F-8248 Allen W. Wallace, Senior Judge**

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**No. M2007-02550-CCA-R3-PC -Filed December 18, 2008**

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A Warren County jury found the Petitioner, Margie J. Farley, guilty of facilitation of first degree felony murder, facilitation of especially aggravated robbery, and criminally negligent homicide. The trial court sentenced her to an effective thirty-seven year sentence, and this Court affirmed her convictions. The Petitioner filed a petition for post-conviction relief, claiming that she failed to receive the effective assistance of counsel at trial. The post-conviction court denied her relief, and she now appeals. After a thorough review of the record and the applicable law, we affirm the post-conviction court's judgment.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed**

ROBERT W. WEDEMEYER, J., delivered the opinion of the court, in which J.C. MCLIN and D. KELLY THOMAS, JR., JJ., joined.

Rick L. Stacy, McMinnville, Tennessee, for the Petitioner, Margie J. Farley.

Robert E. Cooper, Jr., Attorney General and Reporter; Michael E. Moore, Solicitor General; Cameron L. Hyder, Assistant Attorney General; Ann Filer, Assistant District Attorney General *Pro Tempore*, for the Appellee, State of Tennessee.

## OPINION

### I. Facts

### A. Trial

This Court summarized the facts of this case on direct appeal:

Late in the evening on May 4, 2000, the defendant, Margie Jeanette Farley, and a codefendant, Braddie Eric Sullivan, went to the home of the victim, Louie B. Johnson, in Warren County. There, Sullivan beat the victim to death with a tire tool belonging to the defendant and one of the codefendants took the victim's wallet from his pants. Sullivan and the defendant then fled to Florida in the defendant's vehicle. The defendant returned to Tennessee and was subsequently questioned by law enforcement officials. She was arrested on May 13, 2000, and she and Sullivan were charged by a Warren County Grand Jury in a three-count indictment with first degree felony murder, especially aggravated robbery, and first degree premeditated murder.

*Proof at Trial*

Testifying for the State, Wayne Millraney stated that he was at the victim's home between 6:00 and 7:00 p.m. on Thursday, May 4, 2000, and the victim was present and in apparent good health.

Mike McKinney testified that he went to the victim's home around 4:45 p.m. on Friday, May 5, 2000, to look at some dog boxes for sale and discovered the victim's body lying in the backyard. McKinney then walked to the nearby Delores Market and asked someone to call 9-1-1.

Warren County Sheriff's Deputy Jim Shules testified that he was dispatched to the victim's residence at 4446 Old Smithville Road. Upon arrival, he discovered the victim lying "towards the end of his driveway" and observed "marks in the driveway," as if "[s]omething had dug it up," as well as bloodstains. He then notified investigators, who took over the crime scene.

Herbert Rowland, the Chief Investigator for the Warren County Sheriff's Department, testified that he was dispatched to investigate the victim's death. He discovered the victim's boots near the bottom of the back porch steps and the victim's pants in the yard, both separate from the victim's body. The victim's trailer was locked, and Rowland did not see any signs of a break-in. About two days later, Rowland and other investigators walked Old Smithville Road and discovered a tire iron "perceived to be the murder weapon." About a mile from the victim's trailer, they found the victim's wallet, which did not contain any money, and a bandana. They also found some of the contents of the wallet strewn about the area.

As the investigators were trying to develop a suspect, the defendant's name "came up," so Rowland interviewed her at the Sparta Police Department on May 11, 2000. This interview with the defendant, who was not yet under arrest, was videotaped, and the videotape was played for the jury. During the interview, the defendant stated that the victim was her "sugar daddy" and he was worth more to her alive than dead. She said she was in Georgia and Florida with her friend, Sharon Wilson, on the day of the murder. She also stated that the last time she saw the victim was around Christmas of 1999, and the last time she spoke with him on the telephone was a week or two before his death. Although the defendant gave other statements to police, this first one was the only one that was videotaped.

Investigator Jackie Matheney, Jr., of the Warren County Sheriff's Department testified that the tire tool was recovered near 4281 Old Smithville Road, approximately two-tenths of a mile from the victim's trailer. The tire tool was collected and sent to the crime lab. The tire tool, wallet, and bandana were all found "going back into town" from the victim's trailer.

Michael Turbeville, a forensic scientist in the Serology and DNA Unit of the Tennessee Bureau of Investigation ("TBI") Crime Laboratory in Nashville, testified that he was summoned to Warren County to help process the murder scene. The victim, clothed in a shirt and underwear, was found lying in the yard. His pants were located a few feet from his head, and his boots were found approximately thirty to thirty-five feet away from his body. At least two tire track impressions and one shoe track impression were made, but someone other than Turbeville analyzed those. Later, Turbeville examined the defendant's 1992 Buick Regal for blood and discovered that the carpet and upholstery apparently had been cleaned with "some kind of cleaning agent or some kind of chemical solvent," which "could have potentially destroyed any blood evidence that was present." He also discovered the victim's blood and hair on the tire tool submitted to the crime lab. No blood was found on the victim's wallet, personal papers, or the bandana. While taking inventory of the Buick Regal, he noted that the jack and the tire tool were missing from the vehicle.

Bobby Phipps, a corrections officer with the Cumberland County Sheriff's Department, testified that the codefendant, Eric Sullivan, was released from the Cumberland County Jail on May 3, 2000, at 2:50 p.m., after the defendant posted his bond.

Mark Eller, an acquaintance of the defendant, testified that he saw the defendant and Sullivan at Phillip Smith's house around 8:30 or 9:00 p.m. on May 4, 2000.

James Phillip Smith testified that the defendant and Sullivan came to his residence in Hickory Valley at Sparta around 1:00 p.m. on May 4, 2000, and gave him about two grams of methamphetamine to sell. Later that day, before dark, they returned to Smith's trailer and retrieved the methamphetamine, which Smith had been unable to sell. The defendant also took a shower at Smith's trailer. The defendant returned to Smith's trailer on May 11 and asked Smith to "give an alibi for her and [Sullivan]." Smith gave two statements to the police. In the first statement, on May 11, he provided an alibi; however, on May 12, he "went to the Sheriff's Department and asked to talk to the detectives" in order to "set the record straight." He admitted that he was not truthful in the first statement. When he saw the defendant on May 12, she had dyed her hair red. Smith said he, Sullivan, and the defendant had all used methamphetamine in the past, but on May 4, Sullivan and the defendant both appeared "pretty normal."

Andreas "Andy" Allen testified that he dated the defendant when he was a teenager and that they were "good friends." He stated that he had read the defendant's statements accusing him of the murder, but he could not have done it because he was incarcerated in the Washington County Jail on the day of the murder. The defendant wrote Allen a letter while he was in jail and asked him to admit to committing the murder because "[Sullivan] threatened to kill her kid and kill her mama and her family if she told anything on him." He believed the defendant "was in fear of her life when she wrote" the letter. On cross-examination, he stated that he flushed the letter from the defendant down the toilet before anyone could read it. He also testified that Sullivan had a violent reputation and had "whipped five (5) deputies in Van Buren County out in the street." He acknowledged that the defendant had a history of violence and that she might commit a violent act if influenced by someone.

Melissa Knowles testified that she knew the defendant through school and "was married into her family." On May 4, 2000, the defendant came to visit Knowles because she was upset and "was having trouble with her boyfriend." About two days later, the defendant, accompanied by Sullivan, came to Knowles' house again to borrow some clothes because she was going on vacation to Georgia. Sullivan waited in the defendant's car while she borrowed the clothes, and the defendant introduced Sullivan to Knowles, saying, "This is my new boyfriend Eric." The defendant's hair was shorter than it was the last time Knowles saw her, and she had changed the color. After her vacation, the defendant returned to Knowles' home alone and said she had been fighting with Sullivan. The defendant began crying and said, "I can't talk to you about it. I just really can't talk about it. . . . Melissa, I don't want to get you into nothing [sic]." She stated the defendant seemed "very scared" of Sullivan and told her, "[I]t is bigger than what you think." On redirect, Knowles refreshed her memory with her statement to police and stated that the defendant actually borrowed clothes

from her on May 4, 2000. The defendant told her that the victim "was going to help her [and] give her money to get back on her feet." She acknowledged that the victim had wired $25 to her to give to the defendant.

Bill Lewis, the defendant's ex-boyfriend and father of her child, testified that in early May 2000, the defendant borrowed some money on a Tuesday for a bond for Eric Sullivan. The defendant and Sullivan came to his house on Wednesday and stayed until about 11:00 p.m. He did not see the defendant again until she returned a week later. At that time, the defendant's hair was short and she had dyed it a "burgundy red color." The defendant called Lewis from Florida on a Monday, and he told her that the Warren County Sheriff's Department wanted to talk to him and that she needed to return to Warren County and talk to them as well. He then wired her some money to a grocery store in Winter Haven, Florida. She arrived back in Tennessee on a Wednesday morning and told Lewis to "go see them [the police] first and see what they wanted." At first, the defendant told Lewis that "she didn't do it," and asked if the victim's body was found near his trailer. Later, she told Lewis that "[Sullivan] was going to protect her or something." Lewis took the defendant to talk to the police on Thursday; afterwards, she said she wanted to put four new tires on her car because "her car was down at [the victim's]." Lewis then had four new tires put on the car at a tire shop. Although he paid the disposal fee for the old tires to the shop, he took the tires at the defendant's request and dumped them on the side of the Old City Dump Road. Lewis identified a lug wrench in court, saying it looked like the one he had seen in the defendant's car. He also recalled the victim's relationship with the defendant, saying he "figured that [the victim] was her sugar daddy." About five or six years before, the defendant "had a couple of friends named Angie and John that talked about if [the victim] ever got robbed that they would have to hit him in the head to rob him." Lewis acknowledged that he was not truthful in his first statement to the police but said he was truthful in his second statement.

Dr. John E. Gerber testified that he performed the autopsy on the victim's body. He determined that the cause of death was "multiple blunt force injuries to the head" and concluded that it was a homicide. He described in detail the various lacerations, hemorrhages, and fractures on the victim's head and skull and stated that the wounds were consistent with having been caused by the tire tool recovered in this case. He said the victim had no drugs in his system, and his blood-alcohol content was .01% which was "a very small amount."

Investigator Tommy Myers of the Warren County Sheriff's Department reviewed the defendant's initial videotaped statement and re-interviewed her, along with Melissa Knowles, on May 12, 2000. The defendant waived her Miranda rights and gave a handwritten statement to Myers. He read the entire statement, in which

the defendant admitted going to the victim's house with Andy Allen, whom she said killed the victim:

> I Margie Farley am making this statement of my own free will and no one has forced me to say anything in this statement.
>
> On Thursday May 4, 2000 I was with a friend & we went to Melissa's house to pick up some clothes that I could wear that she no longer wanted. I told her that I wanted to leave town for a while to get my life together. We left there and went to Phillip Smith's house and I took a shower. W e left there and I dropped my friend off and found out that Andy Allen was looking for me, wanted to talk he said. I went there, met him & we left to go riding around & he was low of cash & so was I & I told him that I had a sugar daddy in McMinniville [sic] that I could get some cash from. We arrived at [the victim's] at around 8:30 or 9:00 maybe later. I walked up & knocked on the door and [the victim] came to the door & opened it, he was drinking & he hugged me & said where have you been you beautiful Bitch. He asked if I needed ciggarettes [sic] and I said yes[.] He said do you want me to go with you to Delore's Market to get some cigarettes and I said no just give me some money because Delore's is closed and I will drive up to Exxon and get some. I knew that Andy was in the car with me and I didn't want [the victim] to see him. [The victim] then asked if I wanted to ride to a bar and I said yes get some shoes on & I will go out to the car & straighten it up & move my clothes brush & hair spray out of the seat because I needed to tell Andy what he wanted to do, so I walked to the car and told Andy that he wanted to go to the bar but we would just tell [the victim] that we were cousins or something and it would be alright. Andy then said "Hell no" I will not watch that old Bastard put his hands all over you. I said wait at the church for me and I will make an excuse to leave early & he said he would so he got out of the car like he was going to walk to the church. I went back in to the trailer and told [the victim] that I was ready & he said he was too so as we started out the door he told me to go first because he always wanted to make sure that the doors was locked. As we started to my car I was about 5 feet ahead of him & the next thing I remember [the victim] was yelling & I looked around & Andy was hitting him in the head with something and he just kept hitting him. I was shocked, scared & terrified of all that was happening & I was yelling stop it you're killing him. Andy then stopped and took the wallet out of his pants ( [the victim's] )[.] He yelled let's go, let's go now so I panicked &

> got in the car & started out to the roadway & from there Andy disposed of the wallet & weapon. I then drove where I was told to drive until he disposed of the clothes he was wearing & from there I took him home & left for Florida.
>
> The friend I spoke of that was with me earlier before at Phillip's was Erick Sulluvan [sic].

Myers and the other investigators "wanted to believe" what the defendant was telling them and wanted to "give her the benefit of the doubt." The defendant agreed to cooperate with the investigators and wore a body wire in an effort to tape-record Andy Allen talking about the victim's death; however, after two or three attempts, they were unable to find Allen. After talking among themselves and comparing notes, the investigators realized there were "some things in [the defendant's statement] that were not true ." Myers told the defendant they "believed that she wasn't being truthful" concerning who was with her at the victim's trailer. The defendant then told the investigators "that everything in the statement was true except for a few things. One, that Andy Allen was not with her, but it was Eric Sullivan." Additionally, she stated that "when [Sullivan] was hitting [the victim] over the head that he told her to grab the wallet, which she did." The defendant said they drove toward McMinnville when they left the victim's residence, and Sullivan threw the tire tool and the victim's wallet out the window. Sullivan also threw out his bandana because "he thought it may have some of [the victim's] blood on it." At that time, the defendant also told them about Bill Lewis buying new tires for her car because she "was afraid that [the police] would track some tire prints to her car." The investigators then questioned Lewis again, and he told them that the first statement he had given was not true and that the defendant "had asked him to lie for her." Lewis took the investigators to where the old tires were dumped, and the investigators recovered the four tires. Myers reviewed his notes and testified that the defendant told him that she and Sullivan went to the victim's trailer "because they needed some money to go to Georgia to sell dope that [Sullivan] had with him." In addition, the defendant "said that she had taken her car and cleaned the carpet with brick acid to remove any blood stains." These admissions were not part of the defendant's written statement because, as the investigators were attempting to get a corrected statement from the defendant, "[s]he just became irate and cussed ... and said she was not going to sign anything." The investigators arrested the defendant and began looking for Eric Sullivan.

On cross-examination, Myers stated that he did not videotape any of his interviews with the defendant. Even though there was videotaping equipment at the White County Jail where the defendant was interviewed, Myers stated he had "never

been trained" to videotape an interview, had never videotaped an interview, and his department did not have the money for such equipment. Myers stated he "just didn't think about it." On redirect, he recalled that the defendant, in her last interview with him, stated that she kept the tire tool behind her seat in the car for protection.

The defendant testified that she met the victim through mutual friends, Johnny and Angie Nunley, and they had a "relationship" during those times when she and Bill Lewis were having problems. She and the victim often "drank a lot" when they were together. Even when they were not dating, they were friends and the victim helped the defendant financially.

She said that Andy Allen was an ex-boyfriend whom she dated in 1986. She first met Eric Sullivan at Allen's trailer in Sparta in April 2000. Allen and the defendant were both using methamphetamine at the time, and Sullivan was both a methamphetamine user and "cook ." When she first met Sullivan, he and Allen, along with several other men, were cooking methamphetamine at Allen's trailer. She explained that methamphetamine is addictive and "keeps you awake ... causes you to be disillusional [sic] ... makes you very paranoid and very jittery." The defendant started using methamphetamine about a month before she met Sullivan. The defendant had never seen Sullivan show any violent tendencies before the victim's murder.

The defendant said that on the day of the murder, Sullivan had finished a batch of methamphetamine, and they went to Phillip Smith's house where Sullivan gave Smith "a couple of grams or so" of methamphetamine. They returned later in the day, and after Sullivan discovered that Smith did not have the money for the methamphetamine, he became "a little irate." The defendant had already asked to take a shower at Smith's house and did so in order to "get awake" because she had "been up for a couple of days." She had called Melissa Knowles and asked her to bring some clothes because it was her intention to spend the night with the victim in McMinnville. Sullivan rode with the defendant to McMinnville because "[h]e had some friends down here in McMinnville that he could stay with, and he said that he was going to Georgia" because his probation was about to be violated for driving the defendant's car on a revoked license. The defendant took Sullivan by his friend's house, but he did not stay because his friend was "probably doing a cook" and was being watched by the police. They then went to the victim's trailer. The victim knew that the defendant was on her way to spend the night with him, and she denied that there was any discussion between her and Sullivan about robbing the victim. The defendant's mother and Bill Lewis also were aware that she was going to see the victim.

They arrived at the victim's trailer around 10:30 or 11:00 p.m., and the defendant tried to get Sullivan to go inside, but "[h]e was just all paranoid." The defendant went to the back door and left Sullivan in the passenger's seat of the car. The tire tool was in the back floorboard because Allen and Sullivan had changed the defendant's tire a few days before. The victim answered the door in his shirt and underwear and asked, "[W]here the hell have you been [,] you beautiful bitch?" She told the victim that a friend was in the car, and the victim suggested they go to the Moose Lodge and get her some cigarettes and drop her friend off. She then went out to the car and told Sullivan that the victim knew he was there and that he could go with them to the bar or they would give him a ride. However, Sullivan said he did not want a ride but was going to walk to a nearby pay phone and call a friend. The defendant went inside the victim's trailer as Sullivan was getting out of the car.

The defendant sat and drank most of a beer while the victim got dressed. As they were leaving, the defendant waited on the porch while the victim locked the door. They "walked off the steps together," but the defendant then walked ahead of the victim some distance. She heard the victim say "goddamn," and thought he had fallen because he had a bad hip. However, when she turned around, she saw the victim fighting with Sullivan and screamed for Sullivan to stop. She testified, "[W]hen I got [Sullivan] to stop, I bent down to see if [the victim] was okay. I was asking him if he was okay and he wasn't talking. I could hear him gurgling." Sullivan screamed for her to grab the victim's keys and wallet, but she refused. She pulled her own keys from her pocket and went to her car. As she was about to drive away, Sullivan jumped in the car, yelling, "[D]rive the fucking car, bitch. Drive the fucking car before I give you the same thing that I just gave him."

They stopped at a store, and the defendant called Bill Lewis who told her "just to calm down, just calm down and listen to [Sullivan] and I will take care of things." Sullivan threw the wallet and tire tool onto the side of the road. The defendant and Sullivan drove to Georgia and then on to Florida, and Sullivan told her that if she told anyone, he would kill her son and "cut him up and send him to [her] in pieces." When she returned to Tennessee, Lewis bought new tires for her car and cleaned the interior.

In her second statement, the defendant said Andy Allen was the murderer because "[the investigators] kept telling me that they knew that it was [Allen] that had done it" and, if she did not give them a written statement, "they couldn't protect me or my kid." She denied ever confessing to taking the victim's wallet but agreed she had taken steps to cover up the crime by changing her tires, cleaning her car, and making false statements to police.

On cross-examination, she acknowledged that she had spent time in prison after pleading guilty to aggravated kidnapping, which she had committed with her husband. She also stated that Sullivan took between $700 and $900 from the victim's wallet and that when she left the victim in his yard near his steps, he was fully dressed. She could not explain how his boots or pants had come off and said, "That has always been a mystery to me." She said she had her hair cut and dyed in Georgia the day after the murder, and Sullivan changed his appearance as well because "he was afraid the police would be looking for us." She also stated that Sullivan told her after the murder that if she "wanted to know why he did it to call [her] boyfriend [Lewis]."

*Sentencing Hearing*

The sole witness at the sentencing hearing was Donna Dunlap, the defendant's probation officer who prepared the presentence report. She testified concerning the defendant's criminal record, which included a pending assault on a police officer charge in Warren County and a violation of an order of protection in 2000. She also had an additional assault conviction and convictions for aggravated kidnapping and three counts of forgery. Additionally, although the offense is not identified in the presentence report, the defendant had a conviction in 1990 for firing a missile into a dwelling. She also stated that the defendant was on parole three times but violated it each time. While in prison, the defendant had obtained her G.E.D., and she told Dunlap that she had completed "anger management and sex abuse and stress management and substance abuse programs." The defendant also told Dunlap that she began using alcohol and Valium when she was twelve and started using cocaine at the age of fourteen, which she used three or four times a week. In addition, she started using methamphetamine right before the victim's murder and was using methamphetamine at the time of the murder.

*State v. Margie Jeanette Farley*, No. M2003-02826-CCA-R3-CD, 2005 WL 366890, at *1-7 (Tenn. Crim. App., at Nashville, Feb. 16, 2005), *perm. app. denied* (Tenn. Jun. 27, 2005). On appeal, this Court affirmed the Petitioner's convictions and sentence. *Id.* at *12.

**B. Post-conviction Hearing**

At the post-conviction hearing the Petitioner testified that she did not receive the effective assistance of counsel because: (1) new evidence had been discovered, because, since the trial, her co-defendant Sullivan had written letters to her in which he took responsibility for the murder; (2) Counsel rarely discussed her case with her; and (3) Counsel had a conflict of interest. She said

Sullivan, her co-defendant, wrote a letter to her apologizing "for everything."[1] In addressing the conflict of interest issue, the Petitioner stated Bill Lewis and her mother hired Counsel to represent her. Lewis signed an agreement with Counsel to pay him $20,000 to represent her. The Petitioner testified that at trial, Lewis was the State's key witness against the Petitioner. The Petitioner testified that Counsel did not question Lewis about his participation in helping the Petitioner get new tires on the car and cleaning the car's interior, despite the fact that she specifically asked Counsel to inquire about those facts. Moreover, she said she did not know Lewis would be testifying against her until the day of trial, which is one of the reasons she did not raise a conflict of interest issue at trial. She testified that Counsel also ineffectively represented her by not interviewing and calling to testify April Rummage, the Petitioner's nurse at the prison; Margaret Davidson, the Petitioner's mother; and Sullivan.

On cross-examination, the Petitioner stated she did not know she could file a conflict of interest form. She explained that Lewis wired her money so she could return to Tennessee from Florida. Upon her arrival, Lewis went to the police station to learn what they were investigating and why they wanted to speak with the Petitioner. He relayed to her they were interested in the Johnson murder. He told her that he told them he did not know what happened in the murder. After the Petitioner became a suspect, Lewis helped her retain an attorney. She reiterated that she did not know Lewis was going to testify until his name was called in the courtroom. She said that, at trial, he testified he helped her conceal her involvement in the Johnson murder by buying her four new tires for her car and disposing of the old ones. The Petitioner said Counsel only met with her two times in the local jail and once at the women's prison to prepare for the case. Counsel also told her that Rummage's testimony was not "important."

The Petitioner testified that she received a letter from Sullivan after she was incarcerated, and she admitted she had a criminal record. In response to the trial court's questions, the Petitioner stated that Lewis thought her car might have some evidence linking her to the crime, so he cleaned it with brick acid, not bleach like he testified at trial. Additionally, she said Counsel did not want her attempt to cover up the crime to be heard by the jury.

Counsel for the Petitioner at her trial testified that he did not call April Rummage at trial because he thought that "any medical testimony would not [be] helpful." Additionally, he "couldn't see the relevance of the insanity defense." He said he made this decision based on the medical records he received, but he did not actually contact Rummage. Counsel stated that he thought the Petitioner agreed. When asked why he did not call the Petitioner's mother to the stand, he said, "I don't have a definite note on that, but I suspect that the reason we didn't call her mother is because [the Petitioner] didn't want her mother to be a witness, or didn't think she'd be helpful." He explained that he did not call Sullivan to testify because "he would have made things worse for [the

[1] The trial court did not admit the letters from Sullivan to the Defendant for lack of authentication by Sullivan.

Petitioner]." Counsel also said the Petitioner never told him she wanted Sullivan called as a witness.

Counsel stated that Lewis hired him for the Petitioner and paid him money pursuant to a written contract. It was Counsel's understanding that the Petitioner then broke up with Lewis through some letter "which created considerable bitterness." Up to the point of receiving the letter, Lewis paid Counsel $10,400; upon receiving the letter from the Petitioner, Lewis stopped paying for representation. Counsel said, "I considered once that happened, that relationship ended, and my ethical obligation was to [the Petitioner], and it did not affect my cross examination of Mr. Lewis." Counsel stated, "[The Petitioner] never expressed any reluctance following this disagreement with Mr. Lewis."

On cross-examination, Counsel stated the Petitioner did not express doubts with respect to his representation of her. "[A]ll of her correspondence and all her letters indicated she was pleased with the efforts that I was expending and that . . . [t]he job that I had done was commendable." Counsel said he knew Lewis was going to be a witness for the State, which he conveyed to the Petitioner. Counsel said that, after Lewis received the "break up" letter from the Petitioner, he no longer dealt with Lewis, and he remained the Petitioner's counsel in accordance with her wishes. Counsel related that the Petitioner made "all kinds of statements" that were generally inconsistent.

Bill Lewis testified he agreed to pay Counsel $15,000 for representing the Petitioner. He said he only paid Counsel $5000 because he began to have doubts about the Petitioner's innocence, so he stopped paying. Lewis said he never told Counsel he was not going to continue paying, rather, he just stopped sending payments. Lewis admitted speaking to the State many times, sometimes at his house. He said the State never threatened to charge him in relation to these offenses.

On cross-examination, Lewis said Counsel cross-examined him at trial about the paternity of his son with the Petitioner, the fee issue, and the money he sent to the Petitioner while she was in Florida. Lewis stated he bought the Petitioner four new tires because hers were worn, and they were going to make a trip to Knoxville for their son to see a doctor.

April Rummage, a nurse practitioner at Cheer Mental Health that performs contract work at the prison, testified that she performed a medical assessment of the Petitioner to determine if she had any psychiatric illnesses. She diagnosed the Petitioner with post traumatic stress disorder and depression with psychotic features. Nurse Rummage said she never spoke with Counsel. On cross-examination, Nurse Rummage stated she was not the Petitioner's treating therapist.

Margaret Davidson, the Petitioner's mother, testified that she accompanied Lewis to hire Counsel for $15,000. She said Lewis paid $5000 that day, and he has made other payments at other times. Davidson said the Petitioner had Lewis call Counsel and talk to him about the Petitioner's

case. She said Counsel only visited the Petitioner twice, which displeased the Petitioner.

Sullivan invoked his fifth amendment right to not incriminate himself and refused to testify.

The post-conviction court issued an opinion in which it delineated its findings of credibility. Referring to Counsel, the trial court wrote, "His testimony was very credible and impressed the Court as being very competent. He explained that petitioner's claimed defense was 'I did not do it.' He had no reason to call [Rummage, Davidson, and Sullivan]." The court pointed out that any newly discovered evidence with respect to Sullivan's letters to the Petitioner was not admitted and Sullivan did not testify. Thus, it could not grant relief on that issue. Finally, with respect to the claim of conflict of interest, the post-conviction court said, "There is no evidence that such arrangement regarding [Counsel's] fee affected in any way his representation of petitioner, and petitioner has totally failed to make such a showing." The Court denied the petition for post-conviction relief. It is from that judgment that the Petitioner now appeals.

## II. Analysis

On appeal, the Petitioner alleges that she did not receive the effective assistance of counsel. The State counters that the Petitioner filed her post-conviction petition beyond the one year deadline and that the Petitioner did receive the effective assistance of counsel.

### A. Timely Filing

The State argues that the Petitioner filed her post-conviction petition beyond the one year deadline imposed by statute, and, therefore, it should be dismissed. The State makes this argument using August 25, 2006 as the date of filing. The Petitioner replied that she initially filed her petition within the one year prescribed for filing.

Tennessee Code Annotated section 40-30-102(a) (2006) provides a one year time period for a defendant to file a petition for post-conviction relief:

> [A] person in custody under a sentence of a court of this state must petition for post-conviction relief under this part within one (1) year of the date of the final action of the highest state appellate court to which an appeal is taken or, if no appeal is taken, within one (1) year of the date on which the judgment became final, or consideration of the petition shall be barred.

In this case, the final action taken on the Petitioner's case was the Tennessee Supreme Court denying her application for permission to appeal on June 27, 2005. The Petitioner initially filed her petition for post-conviction relief on May 3, 2006, which is within the one year time limitations period dictated by the statute. Given that Petitioner filed her initial petition for post-conviction relief within the one year statutory period of the final judgment of her case, we conclude that her petitioner for post-conviction relief was timely filed.

### B. Ineffective Assistance of Counsel

The Petitioner claims she did not receive the effective assistance of counsel because: (1) Counsel did not ask Lewis difficult questions because of a conflict of interest based on Lewis's payment of Counsel's fees; (2) Counsel did not call certain witnesses to testify at trial, namely Nurse Rummage, Davidson, and Sullivan; and (3) Counsel did not adequately meet with her to prepare the case.

The right of a criminally accused to representation is guaranteed by both the Sixth Amendment to the United States Constitution and article I, section 9, of the Tennessee Constitution. *State v. White*, 114 S.W.3d 469, 475 (Tenn. 2003); *State v. Burns*, 6 S.W.3d 453, 461 (Tenn. 1999); *Baxter v. Rose*, 523 S.W.2d 930, 936 (Tenn. 1975). The following two-prong test directs a court's evaluation of a claim for ineffectiveness:

> First, the [petitioner] must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the [petitioner] by the Sixth Amendment. Second, the [petitioner] must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the [petitioner] of a fair trial, a trial whose result is reliable. Unless a [petitioner] makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

*Strickland v. Washington*, 466 U.S. 668, 687 (1984); *State v. Melson*, 772 S.W.2d 417, 419 (Tenn. 1989).

In reviewing a claim of ineffective assistance of counsel, this Court must determine whether the advice given or services rendered by the attorney are within the range of competence demanded of attorneys in criminal cases. *Baxter*, 523 S.W.2d at 936. To prevail on a claim of ineffective assistance of counsel, a petitioner must show that "counsel's representation fell below an objective standard of reasonableness." *House v. State*, 44 S.W.3d 508, 515 (Tenn. 2001) (citing *Strickland*, 466 U.S. at 688 (1984)).

When evaluating an ineffective assistance of counsel claim, the reviewing court should judge the attorney's performance within the context of the case as a whole, taking into account all relevant circumstances. *Strickland,* 466 U.S. at 690; *State v. Mitchell*, 753 S.W.2d 148, 149 (Tenn. Crim. App. 1988). The reviewing court must evaluate the questionable conduct from the attorney's perspective at the time. *Strickland,* 466 U.S. at 690; *Hellard v. State*, 629 S.W.2d 4, 9 (Tenn. 1982). In doing so, the reviewing court must be highly deferential and "should indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Burns*, 6 S.W.3d at 462. Finally, we note that a defendant in a criminal case is not entitled to perfect representation, only constitutionally adequate representation. *Denton v. State*, 945 S.W.2d 793, 796 (Tenn. Crim. App. 1996). In other words, "In considering claims of ineffective assistance of counsel, 'we address not what is prudent or appropriate, but only what is constitutionally compelled.'" *Burger v. Kemp*, 483 U.S. 776, 794 (1987) (quoting *United States v. Cronic*, 466 U.S. 648, 665 n.38 (1984)). Counsel should not be deemed to have been ineffective merely because a different procedure or strategy might have produced a different result. *Williams v. State*, 599 S.W.2d 276, 279-80 (Tenn. Crim. App. 1980). The fact that a particular strategy or tactic failed or hurt the defense does not, standing alone, establish unreasonable representation. *House*, 44 S.W.3d at 515 (citing *Goad v. State*, 938 S.W.2d 363, 369 (Tenn. 1996)). However, deference to matters of strategy and tactical choices applies only if the choices are informed ones based upon adequate preparation. *House*, 44 S.W.3d at 515.

If the petitioner shows that counsel's representation fell below a reasonable standard, then the petitioner must satisfy the prejudice prong of the *Strickland* test by demonstrating "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland,* 466 U.S. at 694; *Nichols v. State*, 90 S.W.3d 576, 587 (Tenn. 2002). This reasonable probability must be "sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694; *Harris v. State*, 875 S.W.2d 662, 665 (Tenn. 1994).

**1. Conflict of Interest**

In this case, the Petitioner alleges Counsel failed to provide her with effective assistance throughout her trial because he had a conflict of interest. The Tennessee Rules of Professional Conduct for attorneys require that "[a] lawyer shall not represent a client if the representation of that client may be materially limited by . . . the lawyer's own interests, unless: (1) The lawyer reasonably believes the representation will not be adversely affected; and (2) The client consents in writing after consultation." Tenn. Sup. Ct. R. 8 (1.7b). "When counsel is unable to provide a 'zealous representation . . . unfettered by conflicting interests, 'there has been a breach of the right to the effective assistance of counsel." *State v. Billy Jackson Coffelt*, No. M2005-01723-CCA-DAC-CD, 2006 WL 2310597, at *16 (Tenn. Crim. App., at Nashville, Aug. 8, 2006) (citing *State v. Thompson*, 768 S.W.2d 239 (Tenn. 1989)), *no Tenn. R. App. P. 11 application filed*.

The United States Supreme Court articulated the standard the Petitioner must meet when trying to prove ineffective assistance of counsel due to a conflict of interest:

> [W]e held that prejudice is presumed when counsel is burdened by an actual conflict of interest. In those circumstances, counsel breaches the duty of loyalty, perhaps the most basic of counsel's duties. Moreover, it is difficult to measure the precise effect on the defense of representation corrupted by conflicting interests. Given the obligation of counsel to avoid conflicts of interest and the ability of trial courts to make early inquiry in certain situations likely to give rise to conflicts, . . . it is reasonable for the criminal justice system to maintain a fairly rigid rule of presumed prejudice for conflicts of interest.

*Strickland*, 466 U.S. at 692. "For the petitioner to prevail based on a conflict of interest, the conflict must be actual and significant, not irrelevant or 'merely hypothetical.'" *Mitchell Bowers v. State*, No. W2005-01051-CCA-R3-PC, 2006 WL 3218521, at *5 (Tenn. Crim. App., at Jackson, May 2, 2006), *perm. app. denied* (Tenn. Mar. 5, 2007). The Tennessee Supreme Court has held that "an actual conflict of interest includes any circumstances in which an attorney cannot exercise his or her independent professional judgment free of 'compromising interests and loyalties.'" *State v. White*, 114 S.W.3d 469, 476 (Tenn. 2003).

In this case, Lewis and Davidson hired Counsel, and Lewis signed a written contract to pay Counsel $15,000 to represent the Petitioner. While Lewis was paying Counsel, the Petitioner had Counsel call Lewis to update him and her mother on his preparations for her case. Midway through the representation, Lewis stopped paying Counsel. There is some dispute over how much Lewis still owed Counsel, but it was at least several thousand dollars. Lewis and Counsel had no further discussions concerning the payment of additional attorney fees by Lewis on behalf of the Petitioner. Counsel, whose testimony was accredited by the post-conviction court, testified that when Lewis stopped paying counsel, following Lewis's break-up with the Petitioner, Counsel continued to represent the Petitioner. Counsel testified that his "ethical obligation" was to the Petitioner. It is clear from the testimony of Counsel that Counsel, the Petitioner, and Lewis were all aware prior to trial that any relationship between Counsel and Lewis pertaining to attorney fees had terminated.

At trial, Lewis testified that he helped the Petitioner buy and put four new tires on her car after the murder. He also helped her dispose of the old tires. Counsel testified that his cross-examination of Lewis was not affected by Lewis's failure to pay further attorney fees on the Petitioner's behalf.

Our review of the record from the Petitioner's jury trial supports this assertion by Counsel. Counsel repeatedly asked Lewis about Lewis's prior statement that Lewis did not believe the Petitioner capable of this crime. The issue of Lewis assisting the Petitioner, after the crime, in

obtaining new tires for her automobile and disposing of the old tires was raised during Lewis's trial testimony. Any attempt by Counsel to implicate Lewis in the crime or in concealing the identity of the Petitioner would almost certainly have implicated the Petitioner as well.

In our view, the Petitioner has failed to establish the existence of an actual and significant conflict of interest. Accordingly, the record does not preponderate against the findings of the post-conviction court. The Petitioner is not entitled to relief on this issue.

**2. Failing to Call Witnesses**

The Petitioner alleges that Counsel failed to call witnesses that would have testified in her favor. Specifically, she claims Counsel should have called Nurse Rummage, Davidson, and Sullivan.

In Tennessee, the petitioner must meet a rigorous test to prove that Counsel's failure to present a witness was prejudicial:

> [W]hen a petitioner contends that trial counsel failed to discover, interview, or present witnesses in support of his defense, . . . the petitioner [must prove] that (a) a material witness existed and the witness could have been discovered but for counsel's neglect in his investigation of the case, (b) a known witness was not interviewed, (c) the failure to discover or interview a witness inured to his prejudice, or (d) the failure to have a known witness present or call the witness to the stand resulted in the denial of critical evidence which inured to the prejudice of the petitioner.

*State v. Black*, 794 S.W.2d 752, 757 (Tenn. Crim. App. 1990). At her post-conviction hearing, the Petitioner put on witnesses Nurse Rummage, Davidson, and Sullivan. However, after reviewing each witness's testimony, we conclude that the failure to call these witnesses did not deny the Petitioner of critical evidence at her trial. Nurse Rummage was a nurse practitioner who diagnosed the Petitioner with several mental illnesses. Accrediting Counsel that the Petitioner's defense theory was one of disavowal, as opposed to one of insanity, we fail to see how the absence of such information prejudiced her. Davidson, the Petitioner's mother, would have only reiterated other witnesses' testimony about how she and Lewis hired Counsel. The redundancy of this testimony with the previously given testimony makes it non-critical. Finally, Sullivan invoked his Fifth Amendment right against self-incrimination, so we cannot evaluate whether the absence of his testimony prejudiced the Petitioner. As such, the Petitioner has not proven prejudice and is not entitled to relief on this issue.

### 3. Failing to Meet with the Petitioner

The Petitioner finally alleges Counsel was ineffective because he failed to meet with her more than three times in the three years leading to her trial. There is no legal requirement of how many times and for how long counsel must meet with a defendant to provide adequate representation. According to Counsel, he received many letters from the Petitioner about her case. He also visited her in jail twice and in the women's prison once. The Petitioner has failed to show how Counsel's lack of personal meeting with her was outside the "wide range of reasonable professional assistance" and how it prejudiced her. *Burns*, 6 S.W.3d at 462. As such, she is not entitled to relief on this issue.

## III. Conclusion

We conclude that the Petitioner has not proven that she received the ineffective assistance of counsel. Based on the foregoing reasoning and authorities, we affirm the judgment of the post-conviction court.

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ROBERT W. WEDEMEYER, JUDGE